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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CARLA HILL,

Plaintiff, Cross-defendant, and
Appellant,

v.

LAW OFFICES OF BEATRICE L. SNIDER,
APC,

Defendant, Cross-complainant, and
Respondent.

D071656

(Super. Ct. No. 37-2015-00014603-
CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed in part; reversed in part with directions.

Carla Hill, in pro. per., for Plaintiff, Cross-defendant, and Appellant.

Klinedinst, Heather L. Rosing, Leah A. Plaskin, and Robert M. Shaughnessy, for Defendant, Cross-complainant, and Respondent.

Carla Hill sued her former attorneys, the Law Offices of Beatrice L. Snider, APC (LOBS), after that firm represented her in postjudgment family law proceedings. After Hill filed a Second Amended Complaint (SAC) against LOBS, stating causes of action

for professional negligence and breach of fiduciary duty, LOBS demurred and moved to strike portions of the SAC. LOBS also moved for summary judgment or summary adjudication of the two causes of action in the SAC. LOBS argued that Hill could not show she would have obtained a more favorable result in her family law proceeding but for LOBS's allegedly negligent acts and omissions.

While the motion for summary judgment was pending, the trial court sustained LOBS's demurrer to the SAC with leave to amend. Hill filed a Third Amended Complaint (TAC). The TAC was a completely rewritten pleading. In the TAC, Hill continued to allege causes of action for professional negligence and breach of fiduciary duty, but she added causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent concealment, "conspiracy," and negligent misrepresentation.

Rather than file a new motion for summary judgment or summary adjudication, LOBS sought an ex parte order from the trial court "deem[ing]" that its prior motion applied to all of the causes of action in the TAC, including the new causes of action that did not appear in the SAC. LOBS argued that because its causation arguments applied to all causes of action in the TAC, it would conserve the resources of the parties and the court to maintain the existing motion and hearing date. The court agreed and ordered LOBS to amend its notice of motion for summary judgment and summary adjudication.

LOBS filed and served an amended notice, which was identical to its prior notice except for a new paragraph stating that the motion "applies to all counts/causes of action alleged in the [TAC] and continues to remain on calendar" for the existing hearing date.

Hill opposed the motion. At the hearing, the trial court granted summary judgment on Hill's TAC.

Hill appeals. She argues the court erred by "deem[ing]" LOBS's motion for summary judgment or summary adjudication to apply to her TAC and by subsequently granting that motion. We agree. Hill's TAC included additional allegations that reflected distinct legal theories of liability that were not present in the SAC, including in the two causes of action they share. Even setting aside the propriety of "deem[ing]" LOBS's motion to apply to the TAC, the motion itself did not meet LOBS's initial burden on summary judgment. It was directed to the SAC and did not address the materially different allegations of the TAC. We therefore reverse the judgment in part with directions to vacate the order granting summary judgment, enter a new order denying LOBS's motion, and conduct further proceedings consistent with this opinion.¹

FACTUAL AND PROCEDURAL BACKGROUND

Consistent with our standard of review of orders granting summary judgment, we recite the historical facts in the light most favorable to Hill as the nonmoving party. (See *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Light v. Dept. of Parks &*

¹ LOBS cross-complained against Hill for unpaid legal fees and obtained an award of approximately \$60,000. Hill challenges that portion of the judgment as well, but her challenge is moot because her obligation to pay that award was discharged in federal bankruptcy proceedings. (See *Hurley v. Bredehorn* (1996) 44 Cal.App.4th 1700, 1703, 1705.) LOBS concedes the obligation was discharged, and we previously ordered this appeal to proceed only as to Hill's TAC. We therefore do not consider Hill's challenge to the jury's award.

Recreation (2017) 14 Cal.App.5th 75, 81.) Additional facts will be discussed where necessary in the next section.

Hill married Ronald Hill in 2009, and they separated approximately 10 months later. In subsequent dissolution proceedings, the parties agreed to mediation, which resulted in a stipulated judgment. Hill was represented at the mediation by Lori V., a San Diego family law attorney. In pertinent part, the stipulated judgment provided that (1) Ronald was awarded all community property assets and debts (if any) in exchange for a \$50,000 equalization payment to Hill; (2) the residence acquired during the marriage with Ronald's separate property funds, and a golf course purchased with Ronald's separate property funds and encumbrances, were awarded to Ronald; (3) Hill's \$50,000 equalization payment reflected her share of any potential community interest in Ronald's ongoing real estate development business; and (4) Ronald's obligation to pay any further spousal support was terminated. The parties also agreed that further investigation and discovery into the value of the community estate was advisable but they instructed their attorneys to settle the matter without a full and complete valuation, and each party acknowledged they were satisfied with the agreed property division.

Six months later, Hill filed a motion to set aside the judgment. Representing herself, she argued that the judgment should be vacated because Ronald did not serve a final declaration of disclosure and the judgment was the result of mistake or duress.

Hill subsequently retained LOBS to represent her in connection with her postjudgment family law proceedings. The retainer agreement specified that Hill would pay an initial retainer fee of \$15,000 and an initial retainer payment of costs of \$1,000. It

further provided that LOBS would have a lien for its fees on any assets awarded in the proceeding and that LOBS may request Hill to sign a note or security instrument secured by other property to ensure payment of its fees and costs.

LOBS, representing Hill, filed a supplemental memorandum in support of her motion to set aside the judgment. The supplemental memorandum argued that the judgment should be vacated because (1) the mediator was improperly appointed and should have acted only as a special master; (2) Ronald failed to provide a final declaration of disclosure; and (3) Ronald breached his fiduciary duty to Hill by failing to disclose the existence, character, and value of his assets. For example, the memorandum identified five bank accounts that Ronald had allegedly not disclosed, as well as millions of dollars in possible community assets. This amount represented, in part, the potential community interest in the residence and golf course acquired during the marriage. The supplemental memorandum requested that the family court provide a written statement of decision.

In a supplemental declaration, Hill provided further detail regarding Ronald's disclosures and his alleged omissions. In addition to the bank accounts, Hill asserted that Ronald had failed to disclose his ownership of various real property lots in and around the golf course, as well as the fact that some lots had been subdivided. Through LOBS, Hill retained an accountant to review Ronald's bank account records and opine regarding the adequacy of Ronald's disclosures. The accountant submitted a written declaration in support of the set aside motion.

Ronald opposed the motion to set aside the stipulated judgment. He argued that Hill had invited any error regarding the appointment of the mediator, and it would not provide grounds to vacate the judgment in any event. Ronald also argued that he had fully disclosed his assets, including in over 10,000 pages of financial and business documents produced during discovery. Ronald claimed that Hill's filings in the dissolution proceedings and her mediation brief showed that she had actual knowledge of the bank accounts and transactions that Ronald allegedly failed to disclose. Although Ronald acknowledged that he did not provide a final declaration of disclosure before entry of the stipulated judgment, he pointed out that Hill had not provided one either. As such, Hill was required to prove that she suffered prejudice from this failure to timely exchange final declarations of disclosure, which she could not do. Ronald requested sanctions against Hill based on what he believed to be Hill's false factual representations regarding Ronald's disclosures and the state of Hill's knowledge at the time of the mediation.

At the hearing, the family court denied Hill's motion to set aside the judgment. It noted that the parties had failed to exchange final declarations of disclosure before entry of judgment, but it found that Hill had not shown the failure had a material impact on the judgment. (See *In re Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 526-528.) The family court determined that the bank account information did not reflect any community property interest, and Ronald had disclosed most of the properties Hill identified. Certain other properties did not need to be disclosed, and Hill was aware of the golf course as a major asset at issue in the dissolution proceedings. The family court

emphasized that Hill waived any asset valuation as part of the stipulated judgment and elected to settle the dissolution proceeding instead of going to trial. The family court found that Hill agreed to have the special master act as a mediator, so she could not assert error based on that dual role.

The family court found that Hill's conduct in filing the set aside motion was sanctionable under Family Code section 271. But it declined to award sanctions against Hill because they would impose an unreasonable financial burden on her. The family court stated its belief that a written statement of decision was unnecessary. It ordered Hill (still represented by LOBS) to prepare an order based on the court's oral ruling denying her set aside motion.²

Hill and LOBS disagreed about the content of the findings and order after hearing. After some discussion, Hill eventually apologized for her part in the dispute and accepted LOBS's draft. LOBS submitted the draft findings and order after hearing, which the family court entered.

In the meantime, however, Hill herself filed another memorandum and declaration in support of her motion to set aside the stipulated judgment, as well as a motion for reconsideration. In light of her filings, LOBS requested that Hill sign a notice of substitution of attorney to end LOBS's appearance in the case. LOBS eventually moved to withdraw as counsel, which the family court granted.

² The trial court indicated the parties could file an ex parte application if they contended a "more formal statement of decision" was required rather than a findings and order after hearing.

Hill sued LOBS. In response to Hill's initial Complaint and her First Amended Complaint, LOBS demurred and moved to strike various portions. LOBS primarily argued that Hill's pleadings were uncertain and failed to allege facts sufficient to state any cause of action. At successive status conferences, the court granted Hill leave to amend her pleadings.

Hill therefore filed her SAC. The SAC alleged two causes of action, for professional negligence and breach of fiduciary duty. The professional negligence cause of action alleged that LOBS failed to meet the applicable standard of care by, among other things, misstating the law governing set aside motions under the Family Code, waiving Hill's ability to obtain a statement of decision, failing to pursue discovery, inadequately addressing Ronald's arguments regarding disclosure, ignoring a letter regarding mediation that Hill claimed supported her position, and failing to offer live testimony of the retained expert accountant. Hill alleged that she would have obtained a more favorable judgment, absent LOBS's errors, because the court would have granted her set aside motion and awarded her attorney fees, sanctions, spousal support, and a one-half interest in the golf course property.

Hill's cause of action for breach of fiduciary duty mirrored her professional negligence claim. She alleged that LOBS did not act diligently in its representation, including failing to conduct discovery and overlooking key issues. She also alleged that a LOBS attorney, Edward C., knew Hill's former attorney Lori on a "close personal basis" and did not reveal this information to Hill. Hill alleged she was damaged because her set aside motion was denied. She claimed that she could have recovered all of the

value of the golf course property, plus attorney fees and sanctions, if LOBS had acted properly.

LOBS again demurred and moved to strike portions of the SAC. In its demurrer, LOBS argued that the SAC was uncertain and failed to allege facts sufficient to state any cause of action. LOBS wrote that the SAC was "ambiguous with respect to the subject of [Hill's] claims" and it "seems to combine multiple legal theories into her causes of action." LOBS asserted "it is difficult to understand the gravamen of each cause of action and for [LOBS] to make informed responses to the allegations." Regarding the breach of fiduciary duty claim, LOBS argued that Hill had not identified any ethical breach beyond potential professional negligence. LOBS noted that Hill mentioned a potential conflict regarding Lori, but it argued that Hill had not alleged any harm that resulted from that conflict. And, regarding both causes of action, LOBS claimed that Hill had not sufficiently alleged facts showing that she would have obtained a better result but for LOBS's alleged errors and omissions.

Several days before the hearing on LOBS's demurrer and motion to strike, LOBS filed a motion for summary judgment or, in the alternative, summary adjudication. LOBS primarily argued that Hill could not establish causation, i.e., Hill could not show her motion to set aside the judgment would have been granted but for any alleged professional negligence or breach of fiduciary duty by LOBS. Similarly, LOBS argued that Hill could not establish actual damages based on any alleged professional negligence or breach of fiduciary duty, i.e., Hill could not show she would have been awarded (or obtained through settlement) any assets beyond what is reflected in the stipulated

judgment (which resulted in a \$50,000 equalization payment to Hill). And, as to the breach of fiduciary duty cause of action, LOBS asserted that Hill could not establish any breach. LOBS claimed the relationship between its attorney and Hill's former attorney was based on nothing more than their shared area of legal practice.

At the hearing on LOBS's demurrer and motion to strike, the trial court agreed with LOBS that the SAC "is currently so uncertain that it is difficult for [LOBS] to provide a meaningful verified response[]. Many sentences are structured in a manner that makes deciphering the meaning arduous and may require speculation by [LOBS] in attempting to respond. . . . On substance, it is not clear what specific actions [LOBS] allegedly took that caused [Hill's] damages." The court believed that Hill's two causes of action seemed to be duplicative. The only additional allegation involved Edward's alleged friendship with Lori. The court found, "However, even if [Hill's] allegation was true, such a friendship would not constitute a breach of any fiduciary duty. [Hill] has not alleged how this supposed friendship harmed her in any way." The court sustained LOBS's demurrer and granted Hill leave to amend. It denied LOBS's motion to strike as moot.

Hill filed her TAC, which contained a number of new allegations and causes of action. Hill alleged that LOBS had abandoned its representation of her, "willful[ly] fail[ed] to perform legal services," engaged in dilatory tactics, failed to pursue discovery, failed to call an expert witness, failed and refused to communicate with Hill, colluded with opposing counsel, improperly obtained a lien on Hill's assets, engaged in unfair business practices, and fraudulently concealed Edward's personal and professional

relationship with Lori. Based on these allegations, Hill asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent concealment, "conspiracy," negligent misrepresentation, professional negligence, and breach of fiduciary duty.

Perhaps in response to the trial court's comments and LOBS's motion for summary judgment, Hill recast her theories of causation and damages. Her TAC focused on the attorney fees she had paid LOBS, in addition to the family court's rejection of her motion to set aside the stipulated judgment. For example, Hill alleged that she was entitled to approximately \$20,000 she paid LOBS because LOBS failed to disclose Edward's relationship with Lori, abandoned its representation of Hill, breached its retainer agreement, engaged in unfair business practices, and violated various ethical rules and fiduciary duties. Hill also sought a declaration of her rights under the law and the retainer agreement, including that LOBS's business practices were fraudulent under Business and Professions Code section 17200.

Three weeks later, LOBS notified Hill via e-mail that it intended to appear ex parte for an order "deem[ing] the pending summary judgment motion applicable to those causes of action that also appear in the [TAC] (negligence and breach of fiduciary duty)" and maintaining the hearing date on that motion. LOBS also notified Hill that it would seek an order shortening time to hear a demurrer to the TAC.

LOBS's ex parte application, filed the day before its ex parte appearance, expanded the requested relief.³ While the application prominently referenced LOBS's request to have the court "deem" the pending summary judgment motion to apply to causes of action that were in both the SAC and TAC, it also requested that the court "deem" the summary judgment motion to apply to *all* the causes of action in the TAC. LOBS argued that those causes of action were equally susceptible to the causation argument in the summary judgment motion. LOBS contended the court had the inherent authority to allow it to proceed with its summary judgment motion against the newly-filed TAC. LOBS's ex parte application also sought an order shortening time on LOBS's demurrer, as well as a motion to strike portions of the TAC.

At the ex parte hearing, the trial court granted LOBS's requested relief. It ordered LOBS to "amend the notice of summary judgment," and it set the hearings on LOBS's demurrer and motion to strike for the same date as LOBS's pending summary judgment motion. Hill did not appear at the ex parte hearing; she was driving from Nevada and got stuck in traffic. A transcript of the hearing is not part of the appellate record.

Later that day, LOBS filed and served an amended notice of motion for summary judgment and summary adjudication. It was the same as its original notice of motion (including the hearing date, now 20 days hence) with the exception of one added paragraph: "Pursuant to the Court's August 9, 2016 Order, this Motion for Summary

³ We are not suggesting LOBS intentionally misled Hill. But the ex parte application included additional details regarding LOBS's requested relief that were not included in its e-mail notice to Hill.

Judgment, or in the Alternative, Summary Adjudication, applies to all counts/causes of action alleged in the [TAC] and continues to remain on calendar for August 26, 2016." Since the remainder was unchanged, it continued to refer to only two causes of action, for legal malpractice and breach of fiduciary duty.

The day after the ex parte hearing, Hill filed her own application for ex parte relief. She sought a continuance of the upcoming omnibus motion hearing date and trial. She contended she had a conservatorship hearing on that date and could not attend. In her supporting papers, she explained that she was stuck in traffic and could not present her opposition to LOBS's ex parte application. She argued that LOBS "should have had to Revise their summary judgment to complaint number 3, instead of using the same one. As the information has changed." She wrote, "[LOBS's counsel] filled [*sic*] the Summary Judgment based on Complaint number two and wants to use it on the Complaint number three. The complaint is a new complaint and different than, and not all applicable too anymore [*sic*]." Hill also wanted to obtain legal counsel to assist her on the motion hearing date and at trial.

At Hill's ex parte hearing, the trial court continued the motion hearing from the morning to the afternoon, on the same day, and denied Hill's request to continue trial. A transcript of this hearing, as well, is not part of the appellate record.

Hill did not file timely oppositions to LOBS's motion for summary judgment, demurrer, or motion to strike. In its replies, LOBS noted Hill's nonopposition and advanced additional arguments. LOBS's reply in support of its summary judgment motion reiterated its argument that Hill could not show she would have obtained a better

result but for LOBS's alleged errors and omissions. LOBS acknowledged that Hill had pled additional causes of action in her TAC, but it argued that each required the same showing of causation.

In the days leading up to the motion hearing, Hill filed a number of documents. She filed another ex parte application to continue the hearing and extend time for her to respond. She also filed oppositions to LOBS's motions and demurrer, declarations in support of those oppositions, objections to evidence, an opposing separate statement of material facts, and a document containing potential additional allegations if she were granted leave to amend her complaint again.

At the hearing, the trial court stated that it had considered all of Hill's late-filed documents. After hearing argument, the court denied Hill's application for a continuance and granted LOBS's motion for summary judgment. In a written minute order, the court stated, "[Hill] alleges that but for LOBS'[s] actions, the set aside motion would have been granted and she would have received a better result in her divorce. However, the evidence does not show that her set aside motion would have been granted and that she would have obtained a better settlement or result at trial. [¶] . . . [¶] There is no showing of causation or damages based on anything that LOBS did or did not do in representing [Hill]." The court concluded that LOBS's demurrer and motion to strike were moot in light of its summary judgment ruling.

Approximately two months later, the trial court held a jury trial on LOBS's cross-complaint against Hill for unpaid legal fees. The jury found in favor of LOBS and

awarded approximately \$60,000. (See fn. 1, *ante*.) The court entered judgment, and Hill appeals.

DISCUSSION

I

Standing to Appeal

While this appeal was pending, Hill filed for Chapter 7 bankruptcy protection. LOBS argues that, because of deficiencies in Hill's bankruptcy filings, her causes of action against LOBS remain with the bankruptcy trustee and Hill has no standing to maintain this appeal. According to documents attached to LOBS's respondent's brief, Hill's bankruptcy filing did not list this lawsuit in the section requiring her to identify any claims against third parties. However, Hill did list this lawsuit in the section requiring her to identify past or pending litigation. She described it as including issues of legal malpractice and breach of contract, and she noted it was on appeal. Hill later filed an amended schedule in which she listed this lawsuit, among others, in the section for claims against third parties. The next day, the federal court appears to have entered an order discharging Hill's debts. A week later, the court closed the bankruptcy case.

"The commencement of Chapter 7 bankruptcy extinguishes a debtor's legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate. [Citations.] Thus, "[g]enerally speaking, a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it." " (M&M Foods, Inc. v. Pacific American Fish Co., Inc. (2011) 196 Cal.App.4th 554, 562, italics omitted.) Under certain circumstances,

however, a debtor's interest in a pending cause of action may revert back to the debtor at the conclusion of the bankruptcy case. For example, if a cause of action is listed in the debtor's bankruptcy schedules, and the bankruptcy trustee does not otherwise administer it, the cause of action is "abandoned" to the debtor when the bankruptcy case ends. (See 11 U.S.C. § 554(c); *Cusano v. Klein* (2001) 264 F.3d 936, 945 (*Cusano*).) But, if a debtor does not properly schedule a cause of action or other asset, it will not be automatically abandoned by the trustee and it remains in the bankruptcy estate. (*Cusano*, at pp. 945-946.)

As an initial matter, Hill objects to the bankruptcy documents LOBS submitted in support of its argument. She points out that the documents were not part of the appellate record and LOBS did not file a request for judicial notice. LOBS simply attached copies of the documents to its respondent's brief. Furthermore, we note that the documents are incomplete and reflect only isolated pages from Hill's bankruptcy filings.

Hill's objection is well-taken. The bankruptcy documents are not part of the record on appeal. LOBS was required to file and serve a separate motion requesting that we take judicial notice of the documents. (Cal. Rules of Court, rule 8.252(a).) LOBS did not do so. We will therefore disregard them. (See *Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal.* (2016) 245 Cal.App.4th 821, 834; *Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 723.) Without such documents, LOBS's argument cannot succeed.

Moreover, even if we were to consider the documents LOBS submitted, we would conclude Hill has standing to maintain her appeal. "While there are no 'bright-line rules' a debtor must follow to exempt a cause of action, the schedules must contain sufficient

detail to lead the trustee to the claim ultimately asserted." (*Ricketts v. Strange* (2017) 293 Va. 101, 110.) Hill listed her litigation against LOBS in her bankruptcy petition. The trustee was provided notice that Hill had asserted claims against a third party, even if Hill did not separately list those claims a second time in the proper section. Hill's later amendment, which provided additional detail, was filed very late in her bankruptcy proceeding, but it does not appear to have generated any interest in the claims at issue here by the trustee, the court, or any creditor. Because Hill's claims against LOBS were sufficiently scheduled and were not otherwise administered by the trustee, they reverted back to her after her bankruptcy case ended. (See *Cusano, supra*, 264 F.3d at p. 945.) Hill therefore has standing to maintain this appeal.

II

Summary Judgment Standards

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) "A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. [Citation.] The burden of persuasion remains with the party moving for summary judgment. [Citation.] When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was

more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' " (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 (*Kahn*).)

A defendant "must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar, supra*, 25 Cal.4th at p. 851, italics omitted.) In other words, "[i]f the defendant fails to meet [his] initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied." (*San Jose Const., Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1534 (*San Jose Const.*).)

A defendant must identify in a separate statement the material facts he contends are undisputed and entitle him to summary judgment. (See Code Civ. Proc., § 437c, subd. (b)(1).) A court must assess the import of those facts in light of the allegations of the plaintiff's operative complaint. " 'The complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action' [citation], hence the moving party's separate statement must address the material facts set forth in the complaint." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 168 (*Teselle*).) " 'If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. "The moving defendant whose declarations omit facts as to any such theory . . . permits that portion of the complaint to be unchallenged." ' " (*Id.* at p. 163.) A defendant's motion for summary judgment that

fails to address a pleaded theory must be denied regardless of plaintiff's showing in opposition. (*Id.* at pp. 161-162 ["A summary judgment may not be granted when the moving party has failed to 'refute [a] tenable pleaded theor[y].' "]; accord, *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165 (*Jameson*).)

"We review the record and the determination of the trial court de novo." (*Kahn, supra*, 31 Cal.4th at p. 1003.) "We apply the same procedure used by the trial court: We examine the pleadings to ascertain the elements of the plaintiff's claim; the moving papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant did meet this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact." (*San Jose Const., supra*, 155 Cal.App.4th at p. 1535.)

III

LOBS's Motion for Summary Judgment

Hill raises numerous challenges to the trial court's order granting summary judgment. She primarily contends the court erred by "deem[ing]" LOBS's motion to apply to her TAC, by maintaining the existing hearing date on the motion, by granting the motion notwithstanding deficiencies in LOBS's initial evidentiary showing, and by not allowing her to amend her allegations and file a fourth amended complaint.

Several problems and potential errors resulted from the trial court's decision to "deem" LOBS's motion for summary judgment applicable to Hill's TAC and maintain the existing hearing date. "Because there is but one complaint in a civil action [citation], the filing of an amended complaint moots a motion directed to a prior complaint." (*State*

Compensation Ins. Fund v. Superior Court (2010) 184 Cal.App.4th 1124, 1131 (*State Fund*).) "After a cause of action is amended, the court may rule in favor of the defendant if, *upon subsequent motion, or perhaps renewal of the earlier motion if appropriately framed*, it is shown (a) that plaintiff simply cannot state a cause of action on the theory relied upon (in effect a judgment on the pleadings *without* leave to amend, [citation]) or (b) there are no triable material issues of fact which would permit recovery on that theory." (*Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 536, first italics added.) LOBS did not make a subsequent motion or renew its previous motion. Instead, it maintained its existing motion without change. The court's order "deem[ing]" LOBS's motion applicable to Hill's TAC effectively amended the motion. But by doing so without continuing the hearing date, Hill was deprived of the 75-day notice period mandated by statute. (See Code Civ. Proc., § 437c, subd. (a)(2); see also *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 765-766 [trial court has no authority to shorten 75-day notice period].)

We need not resolve whether these procedural issues constitute reversible error because, even viewed on its own terms, LOBS's motion for summary judgment does not meet LOBS's initial burden. The motion and its supporting evidence were directed to the allegations of the SAC, not the materially different allegations and additional causes of action in the TAC. Even assuming the trial court could properly have considered the motion, it should have been denied. (See *State Fund, supra*, 184 Cal.App.4th at p. 1134 ["markedly different" allegations of amended complaint required denial of summary judgment motion directed to original complaint].)

The facts LOBS must establish in order to meet its initial burden on summary judgment are framed by the TAC. (*Teselle, supra*, 173 Cal.App.4th at p. 168.) As noted, Hill alleged in her TAC that LOBS had abandoned its representation of her, "willful[ly] fail[ed] to perform legal services," engaged in dilatory tactics, failed to pursue discovery, failed to call an expert witness, failed and refused to communicate with Hill, colluded with opposing counsel, improperly obtained a lien on Hill's assets, engaged in unfair business practices, and fraudulently concealed Edward's personal and professional relationship with Lori. Based on these allegations, Hill asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent concealment, "conspiracy," negligent misrepresentation, professional negligence, and breach of fiduciary duty. Hill alleged that she had been harmed by the family court's failure to grant her set aside motion, by her loss of \$20,000 in legal fees to LOBS, and by LOBS's demands that she pay some \$60,000 more.

Although the TAC shares some common legal theories with the SAC, there are some significant differences. The TAC departs from the SAC in its demand for \$20,000 in damages based on the legal fees Hill paid to LOBS. The theories underlying the demand also differ from the SAC; they allege that LOBS breached the retainer agreement and is therefore not entitled to legal fees, that LOBS engaged in serious ethical misconduct and therefore forfeited its fees, and that LOBS fraudulently obtained the fees by engaging in unfair business practices and by concealing the relationship between LOBS attorney Edward and Hill's former attorney Lori.

LOBS's motion for summary judgment does not identify facts and provide evidence that would (1) preclude a reasonable trier of fact from finding in Hill's favor or (2) show Hill does not possess and cannot reasonably obtain needed evidence to support these theories. (See *Kahn, supra*, 31 Cal.4th at pp. 1002-1003.) This circumstance is unsurprising, given that LOBS's motion for summary judgment was filed before Hill asserted these theories in her TAC. Instead, LOBS's motion is directed to the primary theory of the SAC, that LOBS's professional negligence and breach of fiduciary duty harmed Hill by causing the family court to deny her set aside motion. Because the motion does not address Hill's separate allegations and theories that differ from those in the SAC, it was inadequate and should have been denied. (See *Jameson, supra*, 215 Cal.App.4th at p. 1165; *Teselle, supra*, 173 Cal.App.4th at pp. 163, 173; *San Jose Const., supra*, 155 Cal.App.4th at p. 1534.)

LOBS nonetheless argues that summary judgment was proper because all of the causes of action in the TAC required a showing of "causation" and LOBS's motion showed that Hill could not prove causation. But causation does not exist in a vacuum; the element only has meaning when we consider the specific allegations at issue, as framed by the pleadings. In the SAC, Hill essentially alleged that certain professional and ethical violations caused her to lose her set aside motion. In the TAC, Hill alleged among other things that LOBS's professional and ethical lapses caused her to pay (and LOBS to gain) \$20,000 in legal fees. These allegations both concern "causation," but the facts required to refute them are different. Because LOBS's causation argument focuses

on the merits of Hill's set aside motion, it does not address all theories of causation in the TAC.⁴

LOBS further asserts, "No matter how [Hill] titled her claims, she was consistently complaining about the same primary right: the right to be free from malpractice." Similarly, LOBS claims that "[Hill] added no new parties to her TAC, nor did she raise new issues; instead she alleged the same cause of action [sic] arising from LOBS'[s] representation in connection with the set aside motion." These statements fail to account for the substantial and material differences between the SAC and the TAC. For example, Hill's fraudulent concealment and negligent misrepresentation causes of action reflect a concern not for malpractice but for fraud. And, even if other causes of action could be colloquially referred to as "malpractice," Hill's theories of how LOBS's professional and

⁴ We note that Hill's TAC also contained allegations of additional professional and ethical lapses that were not addressed in LOBS's motion for summary judgment. These additional allegations reflect additional theories that should have been addressed in LOBS's motion as well. (See *Teselle, supra*, 173 Cal.App.4th at p. 163; see also *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 396-397.)

ethical lapses harmed her were not the same in the SAC and TAC. We therefore reject LOBS's argument premised on the existence of a single primary right.⁵

Given the history of this case, we understand the trial court's desire to help the parties expeditiously resolve their claims by maintaining the then-pending hearing and trial dates. For reasons stated *ante*, however, we must reverse. We emphasize that the issues presented in this appeal are limited. We decide only that LOBS's motion for summary judgment, which was directed at the allegations of the SAC, was insufficient to meet LOBS's initial burden when judged against the materially different allegations of the TAC. We do not decide whether the TAC alleges facts sufficient to state any cause of action or whether a different, properly noticed, and adequately supported motion for summary judgment might be successful. We similarly take no position on the other motions—directed at the TAC—which were pending when the trial court granted summary judgment in favor of LOBS. These issues are properly resolved in the first instance by the trial court.

⁵ To the extent LOBS argues that Hill forfeited her argument that LOBS failed to meet its initial burden on summary judgment by failing to make that argument in the trial court, we disagree. Because the moving party must meet its initial burden before the opposing party's papers are considered, the opposing party cannot forfeit the argument that this initial burden was not met. (*Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose* (2009) 174 Cal.App.4th 339, 367; see *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086-1087 [even failure to oppose does not justify granting summary judgment if initial burden is not met].) And, in any event, we conclude Hill did raise this argument below. Her opposition referenced LOBS's initial burden and argued that this burden had not been met.

DISPOSITION

The judgment is reversed in part as to Hill's TAC against LOBS. The trial court is directed to vacate its order granting LOBS's motion for summary judgment, enter a new order denying the motion, and conduct further proceedings consistent with this opinion. In all other respects, the judgment is affirmed. Hill is entitled to her costs on appeal.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.